PELANGI BARAT SDN BHD *a*

v.

ARAB-MALAYSIAN BANK BHD

HIGH COURT MALAYA, JOHOR BAHRU *b*
SYED AHMAD HELMY JC
[ORIGINATING SUMMONS NO: 24-515-2001]
29 OCTOBER 2001

BANKING: *Securities for advances - Charges - Third party charge - Disbursement of loan - Disbursement conditional on furnishing of additional security by borrower - Failure to provide additional security thereof - Whether had discharged the third party charge - Waiver - Whether bank entitled to waive conditions for disbursement - Conclusiveness of debt - Whether borrower's indebtedness could be conclusively ascertained by Certificate of Indebtedness - Bankers Books (Evidence) Act 1949 s. 3* *c* *d*

On 9 September 1999, the respondent bank granted a term loan facility of RM4 million and an overdraft facility of RM3.25 million to HC Industries Sdn Bhd ('the company'). As security for the facilities, the applicant executed two third-party charges over its land ('the charged property') in favour of the bank. Apart from the charged property, the bank had also obtained an undertaking by the company to furnish additional security for the term loan. The company however reneged on its undertaking, and so did not furnish any further security to the bank. *e*

The company did not utilise the term loan facility, but utilised RM750,000 of the overdraft facility. Upon default by the company in the payment, the bank obtained a judgment for the said sum and demanded payment thereof by the applicant. The applicant contended that the bank was not entitled to the payment, and in the circumstances, applied for a discharge of the two charges and for the return of the title deeds. *f* *g*

Before the learned judicial commissioner, the applicant argued that the loan agreement herein had expressly subjected the disbursement to the condition precedent of the furnishing of additional security by the company, and since the bank had not obtained such security, the charged property, of necessity, must have been discharged from remaining as a security. The issues that arose, bearing in mind the terms of the loan agreement and the charge instruments, were: (i) whether the non-disbursement of the loan under the loan agreement could affect the validity of the first charge in respect of the term loan; and (ii) whether the company's failure to provide additional security had discharged the two third-party charges herein. *h* *i*

Held:

[1] The non-disbursement of the term loan facility, which was occasioned by the company's failure to provide the security, did not affect the validity of the charge instrument. The consequence of non-disbursement only prohibited the respondent from relying on it in foreclosure proceedings. It did not extinguish any debt due to the respondent by the applicant. (p 494 g-i)

[2] The applicant had expressly covenanted in cl. 4.05 of the charge instrument for the term loan that they would be liable to the bank notwithstanding any failure by the company to provide the security, so long as there were outstanding monies due and owing by the company, not only in respect of the particular first charge but also of other charges, which must include the second charge herein, which had similar provisions. Clause 4.05 therefore disentitled the applicant to a discharge of the charge created, since there were outstanding amounts owing by the company, which outstanding amount had been conclusively established by the bank vide a Statement of Account in accordance with the requirement of s. 3 Bankers Books (Evidence) Act 1949. (p 495 a-e)

[3] In both the loan agreement and the charge instruments, there were express provisions of waiver of conditions precedent to draw down. These clauses entitled the respondent to waive any of the condition precedents in the disbursement of the loan. The applicant's complaint on the point of non-compliance with the conditions precedent, therefore, could not be sustained. (p 496 b)

[4] The applicant is a business entity who shared common directors with the company. Those directors were seasoned businessmen who executed the loan agreement on behalf of the company and the charge documents on behalf of the applicant. They could not be said not to know the terms and effects of the documents they executed. (p 497 b)

[5] In respect of the second legal charge, the same is still good and valid as the undisputed outstanding amount under the overdraft and trade facility still remains. It follows that there cannot be a discharge until full settlement is effected. (p 497 e)

[Application dismissed.]

Case(s) referred to:

Ban Hin Lee Bank v. Jashbhai Nagjibhai Patel [1992] 1 CLJ 98; [1992] 2 CLJ (Rep) 161 ***(cit)***

Citibank NA v. Ooi Boon Leong & Ors [1981] 1 MLJ 282 ***(refd)***

Malaysian International Merchant Bankers Bhd v. G & C Securities Sdn Bhd & Anor [1988] 2 CLJ 87, [1988] 1 CLJ (Rep) 793 ***(refd)***

BBMB v. Lektron Corp Sdn Bhd & Ors [1992] 1 CLJ 650; [1992] 2 CLJ (Rep) 176 ***(refd)***

Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Bhd & Anor [1996] 2 CLJ 586 ***(dist)***

National Land Finance Company Co-operative Society Limited v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 ***(refd)***

Legislation referred to:

Bankers Books (Evidence) Act 1949, s. 3

Contracts Act 1950, s. 32

For the applicant - T Rajasekaran; M/s T Raja & Co

For the respondent - Cheah Soo Chuan; M/s Lee Hishammuddin

Reported by WA Sharif

JUDGMENT

Syed Ahmad Helmy JC:

The facts herein are fairly straightforward. The respondent bank granted two facilities – a term loan facility of RM4 million and an overdraft and trade facility of RM3.25 million to a company called HC Industries Sdn Bhd (hereinafter called the company) and as security therefore obtained two third party legal charges over the applicants land held under EMR 1112 Lot 983 Mukim Kota Tinggi, Daerah Kota Tinggi, Johor (hereinafter called the charged property). It was a term of the loan agreement that the company was also to furnish as security the property held under HS(D) 177837 Lot PTD 52060 Mukim Tebrau (hereinafter called the company's property) over which the company had executed a sale & purchase agreement dated 19 July 1996 but aborted same some two years later in August 1998.

The loan agreement by the company and the charges by the applicant were all executed on the same day ie, 9 September 1996 and both the company and the applicants had common directors in the form of Yong Kin Feng and Yong Fui Lim.

The term loan facility of RM4 million was not utilised by the company but the overdraft and trade facility was partially utilised by the company in September 1996 in the sum of RM750,000. It is not disputed that the company has defaulted in the payment of the said sum of RM750,000 and for which

the respondent has obtained judgment in Civil Suit No: 22-769-1998 on 6 February 2001. The respondent had demanded from the applicant the outstanding sum owing under the overdraft and trade facility which as at 27 March 2001 stood at RM952,122.49 as per the statement of account exhibited as A8 in encl. 5.

The applicant's application in encl. 3 is essentially for a discharge of the two charges over the charged property by the respondent and the return of the title deeds. The main thrust of the applicant's case is founded on their contention that since the terms of the loan agreement expressly subjects the disbursement to the condition precedent of the furnishing of the security and the charged property, the failure to obtain security over the company's property discharges the charged property from remaining as a security. It is the applicant's case that the obtaining of the company's property as security is a contingent condition pursuant to s. 32 of the Contracts Act and relies on the case of *National Land Finance Company Co-operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282.

The issue for determination is whether the cancellation of the purchase by the company of the company's property discharges the applicant's charge of the charged property to secure the term loan facilities of RM4 million and the overdraft and trade facilities of RM3.25 million.

In respect of the charge to secure the term loan facility of RM4 million it is important to note that cls. 1.02 and 1.03 of the annexture to the charge which was exhibited as A5 in encl. 5 (hereinafter referred to as the first charge) clearly provides that the creation of the charge was in consideration of the term loan facility of RM4 million under the loan agreement exhibited as A1 in encl. 5. It is not disputed that both the exhs. A1 & A5 were executed on the same date.

The question arises on whether the non-disbursement of the loan under loan agreement in exh. A1 affects the validity of the first charge in exh. A5.

The answer in my judgment is an emphatic no. The non-disbursement of the term loan facility of RM4 million which is primarily occasioned by the cancellation of the purchase of company's property does not and cannot affect the validity of the charge instrument in A5. The consequence of non-disbursement only prohibits the respondent from relying on it in foreclosure proceedings, it does not and cannot extinguish any claims of or debt due to the respondent by the applicant more so in the light of the exh. A6 which is the charge to secure the overdraft and trade facilities (hereinafter referred to as the second charge) to secure the overdraft and trade facilities which has been partially disbursed and hence amounting to a debt due.

In point of fact the applicant has expressly covenanted in cl. 4.05 of exh. A5 their liability notwithstanding cancellation of the purchase of the company's property by the company so long as there are outstanding monies due and owing by the company under the charge but also to any other charge which must include any outstanding monies due under the second charge which also contains similar provisions.

Clause 4.05 which is present in both exhs. A5 and A6 is reproduced hereunder:

> Section 4.05 Consolidation
>
> Section 245 of the National Land Code (restricting the right of consolidation) shall not apply to this security and it is hereby expressly agreed and declared that unless the Bank otherwise agrees the charge created hereunder shall not be discharged except on payment by the chargor of not only all moneys and liabilities secured hereunder but also all moneys secured by any other charge created by the chargor in favour of the Bank.

Thus the cumulative effect of cl. 4.05, thereof disentitles the applicant to a discharge of the charge created on the charged properties so long as there are outstanding amounts owing by the company which outstanding amount has been conclusively established by the respondent in the form of the statement of account exhibited as A8 in encl. 5 which is according to the provision of s. 3 Bankers Books (Evidence) Act 1949 *prima facie* evidence of the debt due and owing by the company. The statement of account was issued pursuant to cl. 3.02 appearing in both the charges in A5 & A6 encl. 5, which reads as follows:

> Section 302 Certificate of Outstanding Balance
>
> A certificate signed by any of the authorised officers of the Bank as to the aggregate principal amount of the Advances under the facility outstanding, interest thereon and any other moneys and liabilities owing or payable under the provisions of the Security Documents or intended to be hereby secured at any time hereafter shall be conclusive and binding on the chargor save and except for any manifest error.

A similar clause which came up for determination in *Citibank NA v. Ooi Boon Leong & Ors* [1981] 1 MLJ 282 was held by Raja Azlan Shah CJ (Malaya) (as his majesty then was) to mean that for the purpose of fixing liability of the borrower, the borrowers indebtedness may be ascertained conclusively by a certificate.

The inconclusiveness of the statement of account can only be challenged if there is manifest error - here there is no evidence whatsoever nor any challenge by the applicant as to any manifest error and hence the amount of indebtedness

has been conclusively established and binding on the applicant - *Malaysian International Merchant Bankers Bhd v. G & C Securities Sdn Bhd & Anor* [1988] 2 CLJ 87; [1988] 1 CLJ (Rep) 793.

On the point of non-compliance with the conditions precedent the applicant's complaint cannot be sustained by reason of the fact that in both the loan agreement and the charge annextures there was express provisions of waiver of conditions precedent to draw down.

Section 6.02 of the loan agreements appearing in exhs. A1 & A2 provides as follows:

> Section 6.02 - Waiver of Conditions Precedent to Drawdown.
>
> It is hereby expressly acknowledged and declared that the conditions contained herein are inserted for the benefit of the Bank and may therefore be waived wholly or in part by the Bank at its sole and absolute discretion without prejudicing the Bank's rights and such waiver shall not prejudice the Bank from insisting on the Borrower's compliance with any such waived conditions precedent at any subsequent period as the Bank may think fit and necessary.

Section 9.03(a) and (c) of both the an extures to the charge in exhs. A5 and A6 encl. 5 provides:

> Section 9.03 Modification and Indulgence
>
> The Bank may at any time and without in any way affecting the security hereby created:
>
> a) determine or vary any of the terms and conditions contained in the Loan Agreement or any of the other Security Documents
>
> b) ...
>
> c) deal with exchange release or modify or abstain from perfecting or enforcing any securities guarantees or rights it may now or at any time or from time to time hereafter have from or against the chargor or Borrower or any Security Party or other persons.

The combined effect of the clauses aforesaid clearly entitles the respondent to waive any of the condition precedents in the disbursement of the loan as provided for in the loan agreement which must include the condition precedent regarding the charge over the company's property. Such waiver clauses have been upheld by our courts - *BBMB v. Lektron Corp Sdn Bhd & Ors* [1992] 1 CLJ 650; [1992] 2 CLJ (Rep) 176; *Citibank NA v. Ooi Boon Leong & Ors* [1981] 1 MLJ 282.

The applicant's attempt to rely on the Federal Court case of *Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Bhd & Anor* [1996] 2 CLJ 586 to refute intention to waive cannot be sustained for the obvious reason that the applicants herein are not ignorant layperson who knew nothing of their legal rights. The applicant is a business entity who share common directors with the company. The common directors in the form of Yong Kin Feng and Yong Fui Lin are seasoned businessmen who executed the loan agreement on behalf of the company and the charge documents on behalf of the applicant and hence they cannot be said not to know the terms and the effect of the documents they executed. Directors are alter ego of the business entities – *Ban Hin Lee Bank v. Jashbhai Nagjibhai Patel* [1992] 1 CLJ 98; [1992] 2 CLJ (Rep) 161; *BBMB v. Lektron Corp Sdn Bhd & Ors* [1992] 1 CLJ 650; [1992]2 CLJ (Rep) 176.

Even if there is no such waiver clause the sequence of events herein clearly shows that the non-fulfilment of the furnishing of the security was solely the company's own doing – as they were the ones who terminated the sale and purchase agreement and hence aborted the purchase of the property – the respondent never played any part nor participated encouraged or induced the abortment of the sale and hence cannot be imputed with any blameworthiness pertaining to the non fulfillment of the condition precedents.

In respect of the second legal charge exhibited as A6 in encl. 5 it is still good and valid as the undisputed outstanding amount under the overdraft and trade facility still remains and it follows that there cannot be a discharge until full settlement is effected.

Before concluding I would also like to point out that the case of *National Land Finance Company Co-operative Society Limited v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 is not supportive of the applicant's contingent liability contention for the obvious reason that unlike the FIC approval which was a condition precedent in that case, the charge here is not a contingent contract, it being a security intended to secure the overdraft and trade facility. Further unlike that case, there are express waiver provisions here.

For the reasons aforesaid I dismissed the applicant's application in encl. 3 with costs.